(1) Supreme Court, U.S.
FILED

941470 MAR 2 1995

OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EVANS, INC., *Petitioner*

v.

LARRY P. SPIERER, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

DONALD K. BUCKMAN
Counsel of Record

CANTEY & HANGER, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102
(817) 877-2882

Counsel for Petitioner

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

3PP

QUESTIONS PRESENTED

1. In submitting to the jury the causation question in an age discrimination case, must the trial judge state that the plaintiff is required to prove that his age was a "determinative factor" in the decision to terminate him, or is other wording permissible?

2. Must a trial judge, without a specific request, allow counsel an opportunity to object to a flawed jury charge?

3. When an incorrect age discrimination charge was given, was a judgment for the plaintiff (who was only 43 years old when he was terminated) the result of "plain error"?

LIST OF PARTIES

Evans, Inc., petitioner, and Larry P. Spierer, respondent, were the only parties to the proceedings below. Evans, Inc. has no parent company and has no subsidiaries except wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... a

LIST OF PARTIES ..... b

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION 2

STATUTE AND RULE INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 6

1. To Establish Causation in an ADEA Case, the Plaintiff Should be Required to Meet the "Determinative Factor" Test 6

2. The Trial Judge Should Have Allowed Objections to the Charge at a Specific Point in the Trial 8

3. The Judgment for Spierer was the Result of "Plain Error." 11

CONCLUSION 15

APPENDIX A – Opinion Fifth Circuit Court of Appeals A-1

APPENDIX B – Jury Verdict B-1

TABLE OF AUTHORITIES

Cases Page

Davis v. Ector County, Tex., 40 F.3d 777 (5th Cir. 1994) 12, 13

Gehring v. Case Corp., 43 F.3d 340, 66 F.E.P. Cases 1373 (7th Cir. 1994) 7, 8

Hetzel v. Jewel Companies, 457 F.2d 527 (7th Cir. 1972) 10

Nowell by and Through Nowell v. Universal Elec. Co., 792 F.2d 1310 (5th Cir. 1986) 12

Rhodes v. Guiberson Oil Tools, 39 F.3d 537 (5th Cir. 1994) 13

St. Mary's Honor Center v. Hicks, 509 U.S. ____, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) 13

Statutes

28 U.S.C. § 1254 2

28 U.S.C. § 1291 2

28 U.S.C. §§ 1331, 1343 4

29 U.S.C. § 621 *et. seq.*, ... 2, 7, 15
Age Discrimination in Employment Act (ADEA)

29 U.S.C. § 623 (a) 2

29 U.S.C. § 626 4

COBRA (Consolidated Omnibus Budget Reconciliation Act) 5

Other

Rule 51, Federal Rules of Civil Procedure 2, 3, 9, 10, 15

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EVANS, INC., *Petitioner*

v.

LARRY P. SPIERER, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

The petitioner, Evans, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceedings on January 13, 1995.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not officially or unofficially reported, and is reprinted in the Appendix, p. A-1, *infra*. The trial court sat with a jury and did not issue an opinion.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit, and its judgment, were issued on January 13, 1995. Evans did not request rehearing.

Jurisdiction of this Court is granted by 28 U.S.C. § 1254.

Larry P. Spierer filed his employment discrimination lawsuit in the United States District Court for the Western District of Texas, San Antonio Division, in 1991. Spierer primarily sought, and was granted, relief under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Evans appealed the adverse judgment to the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTE AND RULE INVOLVED

This case involves a provision of the ADEA and a procedural rule.

29 U.S.C. § 623(a) (ADEA):

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

Rule 51, Federal Rules of Civil Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the

requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Spierer managed the Koslow's[1] store in San Antonio, Texas, when his employment was terminated in 1991.

Spierer, who was only 43 years of age at the time, has maintained – and Evans consistently has denied – that Evans unlawfully terminated him because of his age.

Spierer was about age 31 when Evans hired him. Riding the crest of the Texas oil boom, Evans opened its San Antonio store in 1985 and appointed Spierer, who then was about 37, to manage it.

The regional manager over Koslow's left Evans early in 1991; his replacement, Martin Cohen, is approximately the same age as Spierer. Also early in 1991, Ronni Stern, about nine years older than Spierer, was promoted to vice president over all of Evans' United States stores.

Cohen and Stern perceived numerous and varied problems with Spierer's San Antonio store on their first

[1] Evans now operates four Koslow's stores in Texas. Koslow's stores offer luxury clothing of fur and leather. Koslow's, Inc. is a wholly owned subsidiary of Evans, Inc.

visit there in 1991. Stern's career has been in retailing. She testified that Spierer's store exhibited "a lack of excitement, a lack of motivation, a lack of understanding. . . ." Cohen directed Spierer to remedy the deficiencies, which ranged from using improper, unattractive garment hangers to failing to open incoming shipments of merchandise.

Spierer had not cured the problems when Cohen again inspected the store in a month or two, a fact that Cohen reported to Stern.

Stern sat on Evans' executive committee, all of whose members but one were older than Spierer.

The executive committee decided to terminate Spierer, who learned of his termination on March 4, 1991, from Cohen and Evans' human resources director. Spierer was told that the reasons for his termination were "poor performance" and "failure to meet company expectations," coupled with general concern with his management style.

Four months later Spierer complained to the Equal Employment Opportunity Commission of his termination, noting that his replacement (the former assistant store manager) is some ten years younger.

Spierer sued Evans in the U.S. District Court for the Western District of Texas, which had undisputed jurisdiction under 28 U.S.C. §§ 1331, 1343 and 29 U.S.C. § 626.

At trial, the jury was instructed to find for Spierer if he satisfied them that his age was "one of the reasons" for his dismissal. The trial judge at no point told or intimated to counsel that the time was ripe for objections to

his charge, and neither party objected to this incorrect instruction.

The jury answered "yes," i.e. that Spierer's age was a reason for his dismissal. Subsequently, in response to a separate instruction that did use the "determinative factor" wording, and a corresponding question, the jury found for Evans on the willfulness issue. The jury found that Spierer was entitled to $74,764.28 in back pay.

The trial judge denied reinstatement; instead, he awarded $70,952.05 in front pay. Spierer lost on his claim that Evans had violated COBRA (Consolidated Omnibus Budget Reconciliation Act) with regard to the continuation of health insurance benefits. Spierer also was awarded attorney's fees, court costs, and interest.

Evans timely appealed to the U.S. Court of Appeals for the Fifth Circuit, challenging the faulty jury instruction on causation and insisting that the error was "plain" or "fundamental," thereby entitling Evans to a new trial. Evans also argued that the trial judge's failure to hold a charge conference or otherwise to accommodate objections to the charge was erroneous in light of the clear error in the wording of the charge.

A panel of the Court of Appeals for the Fifth Circuit did not dispute Evans' allegation that there was error in the jury charge. According to abundant case law the charge should have asked the jury whether Spierer proved that his age was a "determinative factor" in the decision to terminate his employment. Appendix, p. A-4.

Nevertheless, the Fifth Circuit affirmed judgment for Spierer on its finding that he put before the jury "some

evidence" that his age was a determinative factor for his discharge, thereby making error in the actual charge harmless. Appendix, p. A-8.

Moreover, the Fifth Circuit found no reversible error in the trial court's failure to provide counsel an opportunity to object to the charge. Appendix, pp. A-3, A-4.

ARGUMENT

1. TO ESTABLISH CAUSATION IN AN ADEA CASE, THE PLAINTIFF SHOULD BE REQUIRED TO MEET THE "DETERMINATIVE FACTOR" TEST.

Evans' initial brief and its reply brief in the Court of Appeals focused on a claimed harmful error in the wording of the jury charge that the trial judge gave.

The jury was instructed to return a verdict for Spierer if it found that his age was "one of the reasons" for his discharge. Appendix, p. A-2. The jury answered that question "yes." Appendix, p. B-1.

Evans maintained on appeal that abundant case law required the trial court to inform the jury that Spierer must demonstrate that his age was "a determinative factor" in Evans' decision to terminate him.

In response, Spierer's argument defended the charge given while admitting that Evans' brief cited cases that set forth the essence of a required issue in an age discrimination case.

The opinion of the Court of Appeals fails to cite any precedent for the lenient "one of the reasons" standard that the trial court adopted. However, the Court of Appeals sidestepped the issue of how a district judge

should submit the causation question to a jury. Instead, the Court of Appeals said that it would assume that the jury charge and interrogatories, as a whole, *did not* clearly and accurately convey the appropriate legal standard to the jury. Appendix, p. A-6.

The decision of the Court of Appeals, while mildly critical of the charge given, creates uncertainty about what wording should be used to ask a jury whether an age discrimination plaintiff has proved causation.

Although the Fifth Circuit did not look beyond its own cases in examining this question, an almost contemporaneous decision of the Court of Appeals for the Seventh Circuit harshly criticizes the "determinative factor" test in an age discrimination case. *Gehring v. Case Corp.*, 43 F.3d 340, 66 F.E.P. Cases 1373 (7th Cir. 1994).

In *Gehring*, the trial court's jury charge adopted the "determinative factor" wording which Evans believes should have been used in this case. *Id.*, 66 F.E.P. Cases at 1375. The jury returned a verdict for the defendant employer, *id.* at 1374, and plaintiff appealed.

The Court of Appeals for the Seventh Circuit devoted approximately half of its opinion to scathing criticism of the "determinative factor" jury charge, which it denigrated as containing "arcane, cabalistic, inscrutable, ambiguous, and unnecessary words." *Id.* at 1376.[2]

The bench and the bar, then, are left in considerable doubt about what is (or are) the correct method (or methods) of instructing a jury on causation in an ADEA case. Is it acceptable to inform the jury, as was done in

[2]Despite its distaste for the jury charge, the court affirmed judgment for the employer. *Id.*

this case, that a plaintiff merely must demonstrate that his age was "one of the reasons" for the employer's adverse action? Should the trial court instruct a jury that a plaintiff may prevail only by proving that his age was "a determinative factor," as Evans argued in the Fifth Circuit, not without grudging success but without a clear holding? Or is the Seventh Circuit correct in insistently advocating its "what if" charge, i.e., what would the employer have done "if the employee had been younger than 40 and everything else had remained the same"? *Gehring, supra*, 66 F.E.P. Cases at 1376.

Only this Court is authorized to resolve this uncertainty and to dictate a uniform national standard for use in the large number of age discrimination trials that juries must decide each year.

2. THE TRIAL JUDGE SHOULD HAVE ALLOWED OBJECTIONS TO THE CHARGE AT A SPECIFIC POINT IN THE TRIAL.

The Court of Appeals for the Fifth Circuit incorrectly repudiated Evans' contention that the trial court's failure to hold a charge conference or otherwise to hear objections to the charge excuses the failure of Evans' trial attorney to object to the erroneous charge.

At no point in the trial did the judge say a word to the attorneys about the content of the charge, nor did he signal directly or indirectly that he might entertain objections. Instead, immediately after the charge was read, he called for final argument from the attorneys.[3]

[3]Given an option, the attorneys for both parties chose to argue after, rather than before, the judge read the charge to the jury.

Without recess or other pause after final argument, the trial judge ordered the jury: "Okay. You may now go back and start your deliberations."

In short, Evans argues, the trial judge violated Rule 51, Federal Rules of Civil Procedure, because he did not allow counsel an "[o]pportunity . . . to make any objection out of the hearing of the jury."

According to the Court of Appeals for the Fifth Circuit, which relied on only two cases, a district judge has no obligation to provide counsel an opportunity to object. Appendix, p. A-4. In effect, the Court of Appeals required Evans' trial counsel, in the presence of the jury, to butt in and figuratively countermand the judge's order to "go back and start your deliberations."

In the situation in which Evans' attorney found himself, the Fifth Circuit virtually would require trial attorneys to say: "Not so fast, your Honor; what about hearing some objections to your charge?"

Evans contends that Rule 51 required the trial judge at a minimum, upon the conclusion of final argument, to say to the attorneys something along these lines: "Before the jury begins deliberating, is there anything further from either side that we need to discuss at the bench?" If the charge had been perfect, the omission of such a cue would have been harmless. But here, as has been demonstrated, the charge did contain a serious defect, and Evans was harmed by not being prompted or allowed to object to the charge outside the presence of the jury.

As the Court of Appeals for the Seventh Circuit correctly observed:

> The final sentence of the rule which states, "Opportunity shall be given to make the objection out of the hearing of the jury," protects the parties from prejudicing the jury by having to make apparent to them who has lost the battle over instructions.

Hetzel v. Jewel Companies, 457 F.2d 527, 535 (7th Cir. 1972).

Not only was the jury in this case in the courtroom, but it received an order from the trial judge to "go back and start your deliberations" the instant that Spierer's attorney concluded her final argument.

Evans' remedy should be precisely what the Seventh Circuit prescribed in *Hetzel, supra*, 457 F.2d at 536:

> In this case, as for the future, we believe that an appropriate cure for failures by trial courts to comply with the intent of Rule 51 is to relieve the party aggrieved thereby of the operation of the prohibition against asserting as error the giving of or failure to give an instruction to which objection has not been made.

This case, accordingly, affords this Court an opportunity to interpret the final sentence of Rule 51 and to specify what remedy is available to a litigant whose attorney is not accorded a proper opportunity to object to a defective jury charge without obviously informing the jury that he disagrees with the judge's pronouncement of the law.

3. THE JUDGMENT FOR SPIERER WAS THE RESULT OF "PLAIN ERROR."

Plain or fundamental error, not harmless error, led a misinformed jury to side with Spierer and to rule that his termination from Evans was unlawful.

By no means was Spierer the only manager whom Evans terminated in or near 1991. The group of released Evans managers included some younger than age 40 as well as others who were 40 or more.

The reasons that Evans gave to Spierer at age 43 for his termination were "poor performance" and "not meeting company expectations." The Court of Appeals brushed aside these reasons as "general statements." Appendix, p. A-7.

Evans also terminated an under-40 store manager for what both parties agreed was sexual harassment. His off-payroll documents did not state: "Fired for sexually harassing a female subordinate." Instead, the stated reason was "Mismanagement." Another under-40 manager was let go for the stated reason that his store was "not showing results." Appendix, p. A-7.

The Court of Appeals found "contrast," equivalent to "some" circumstantial evidence of age discrimination, in the mere wording of Evans' off-payroll documents. Appendix, p. A-7. This is despite the unequivocal testimony of Evans' human resources director, Dean Obrecht, that no such distinction is made on the basis of age when management employees must be dismissed. Moreover, Spierer himself admitted to nearly all the deficiencies (ranging from failing to open boxes of expen-

sive merchandise to leaving defective store lighting fixtures uncorrected) that his two supervisors, Cohen and Stern, noted on their first visit to his store. The Court of Appeals offered no explanation of why it considered "mismanagement" to be more specific and less general than "poor performance." Nor is it explain how "poor performance" could be code for "too old" while "mismanagement" equates to "younger than 40."

"Plain error" was found in a case in which, like this one, the charge contained inconsistencies *and* the jury requested a copy of the instructions. *Nowell by and through Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1316 (5th Cir. 1986).

After deliberating less than an hour, the jury in this case sent to the judge a note requesting that the charge be reread, or that a copy of it be sent to the jury room. The record does not contain a rereading of the charge, nor does it show that the trial judge answered the jury note, so it is uncertain whether or not a copy of the charge was delivered to the jury.

Certainly the jury easily could have been hopelessly confused, because the causation section of the charge adopted the "one of the reasons" test but the next section, addressing the willfulness issue, spoke of Spierer's age as a "determinative factor" in the decision to terminate him. Similar confusion was found sufficient reason to reverse and remand in *Nowell, supra*, 792 F.2d at 1317-18.

Another Fifth Circuit case that was reversed and remanded because of confusion and inconsistency within a jury charge is *Davis v. Ector County, Tex.*, 40 F.3d 777

(5th Cir. 1994). In that case, the Fifth Circuit reversed the district court "because the instructions tendered to the jury were sufficiently vague as to permit uncertainty as to the correctness of the verdict." *Id.* at 786. The same situation exists, and the same remedy would be proper, in this case because, as in *Davis*: "Although it is impossible to say whether the jury properly understood the law . . . , the instruction that was given prejudiced the defense." *Id.* at 787.

Further, the Court of Appeals erred in allowing Spierer to prevail upon a production of "some evidence," because that ruling cannot be squared with *St. Mary's Honor Center v. Hicks*, 509 U.S. _____ , 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993).

The Fifth Circuit recently interpreted *St. Mary's* in *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994). According to the Fifth Circuit, a "subsidiary holding" of *St. Mary's* is that:

> To establish that a proffered reason for an action taken by an employer was "pretext for discrimination," the plaintiff must show *both* that the employer's proffered reason was false *and* that discrimination was the real reason.
>
> . . .
>
> [I]t is clear that the Supreme Court ruled against the theory of "pretext only" under which a Title VII plaintiff automatically wins if she successfully shows that the reasons proffered by her employer for her termination are factually false.

Rhodes, *supra*, 39 F.3d at 542 (emphasis in the original).

In the present case, the Fifth Circuit did not require Spierer to produce even "some evidence" that Evans' stated reasons for terminating him (poor performance and failure to meet company expectations) were false *and* in addition to offer "some evidence" that age discrimination was the "real reason" for his termination.

In short, Spierer failed to present the jury "some evidence" that his age was a determinative reason for his termination. The trial court's approval of the verdict, and the entry of judgment, were fundamentally erroneous, and the Court of Appeals' decision perpetuates denial of a correct and fair trial.

CONCLUSION

The numbers of age discrimination administrative charges and lawsuits are unlikely to diminish in the foreseeable future. By hearing this case, this Court has an opportunity to instruct the lower federal courts (where most ADEA cases are tried) as to the correct terminology to use in submitting the causation issue to juries, as well as to elucidate a trial judge's Rule 51 responsibility to receive objections to a jury charge.

Respectfully submitted,

By: _____

Donald K. Buckman
Counsel of Record

CANTEY & HANGER, L.L.P.
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
(817) 877-2882
(817) 877-2807 (FAX)

Counsel for Petitioner

U.S COURT OF APPEALS
FILED
JAN 13 1995
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50339
Summary Calendar

Larry P. Spierer, *Plaintiff-Appellee*,
versus
Evans Incorporated, *Defendant-Appellant*.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-1132)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Evans, Inc., the former employer of Larry Spierer, appeals an adverse jury verdict, contending that the district court's charge and an interrogatory submitted to the jury misstated the applicable standard a plaintiff must prove in an age discrimination action, and, thus, constitute reversible error. We AFFIRM.

---

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Spierer brought an action pursuant to, *inter alia*, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* Under the ADEA, it is unlawful for an employer "to discharge any individual . . . because of such individual's age," provided that the individual is "at least 40 years of age." 29 U.S.C. §§ 623(a)(1), 631(a).

Following a four day trial, the district court included the following in its jury instructions:

> The plaintiff must prove by a preponderance of the evidence each of the following:
>
> (1) That he was between the ages of forty (40) and seventy (70);
>
> (2) That he was discharged; and
>
> (3) That his age was one of the reasons the defendant discharged him. He need not prove that age was the only reason.

Accordingly, the verdict form contained the following interrogatory: "Do you find from a preponderance of the evidence that the plaintiff's age was one of the reasons the defendant discharged him?" Neither party objected to the instruction or interrogatory.

II.

Evans focuses on the language that required the jury to find age as being "one of the reasons" for discharge; it contends that the jury was required instead to find age to be "a determinative factor" in the discharge decision.

The standard of review for jury instructions is usually whether the charge, as a whole, is a correct statement of the law and plainly instructs the jurors as to the principles of law applicable to the factual issues confronting them. *United States v. Chen*, 913 F.2d 183, 186 (5th Cir. 1990) (citations omitted). But, when, contrary to Fed. R. Civ. P. 51, the appellant did not object at trial to the charge, the appellant must establish the instruction (1) was an incorrect statement of the law, and (2) was probably responsible for an incorrect verdict leading to a substantial injustice. *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *see* Fed. R. Civ. P. 61. In other words, for this strict standard, we review the charge to determine if the error was so fundamental as to result in a miscarriage of justice (fundamental error). *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991).

A.

Before addressing fundamental error *vel non*, we turn to Evans' attempt to excuse the lack of objection to the instruction. Rule 51 provides, in part, that

> [n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Fed. R. Civ. P. 51. Evans intimates that a less stringent standard of review should be applied because the dis-

trict court did not provide the opportunity to object. We disagree.[2]

B.

We turn now to the two prongs for our fundamental error review.

1.

As for the first prong (instruction an incorrect statement of the law), Evans states correctly that Spierer's burden under the ADEA was "to show that his age was a determinative factor in [Evans'] decision to fire him, and that the court's instruction was required to 'convey to the jury [this] legal standard. . . .'" *Haring v. CPC Int'l, Inc.*, 664 F.2d 1234, 1239 (5th Cir. 1981) (second alteration in original) (*quoting Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979)). The requirement that age be a determinative factor "requires more than a jury finding that 'age was a factor that affected the [discharge] decision.'" *Id.* (*quoting Loeb*, 600 F.2d at 1019).

Obviously, although the district court has broad discretion in its composition of jury instructions, they must be fundamentally accurate and not misleading. *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 125 (5th Cir. 1992). As noted *supra*, we cannot, however, confine our focus to the isolated phrases that Evans challenges; we must consider the instructions as a whole. *Federal Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994).

---

[2] In *Cosper v. Southern Pac. Co.*, 298 F.2d 102 (9th Cir. 1961), a party sought to justify its lack of objection to an instruction on the same ground as Evans. In rejecting the contention, the court did not interpret the "opportunity to object" provision of Rule 51

In addition to the challenged phrase, the district court also instructed the jury as follows: "If and only if you find that age was a determining factor in the defendant's decision to terminate the plaintiff, you must determine from a preponderance of the evidence whether the defendant acted willfully." Spierer suggests that this instruction, in addition to the standard instruction "not to single out one instruction alone, as stating the law, but . . . [to] consider the instructions as a whole," mitigates any error that may have occurred. But, the former instruction does not clarify or rectify the "one of the reasons" language. On the verdict form, the final interrogatory queried, "Do you find from a preponderance of the evidence that defendant's decision to discharge the plaintiff because of his age was willful?"; the jury answered "No." Read together with the accompanying

---

to mean that the judge must invite criticism of his instructions. If counsel desires to object he should so indicate. He could say, 'May we approach the bench?' or 'We desire to discuss a matter with the court' or any one of a number of statements that would indicate to the court that he desired to make an objection.

. . .

. . . [W]e see no reasons to relieve counsel from the requirement to make known his desire to object to the court's instructions before the retirement of the jury. We, therefore, hold that counsel must indicate in some manner before the jury retires that he desires to make an objection to the instructions before he can successfully contend that the court has failed to comply with the provisions of Rule 51.

Id. at 104. Although in *Swift v. Southern Ry.*, 307 F.2d 315 (4th Cir. 1962), the Fourth Circuit addressed the failure of a court to seek, on its own initiative, objections to its instructions, it did not hold that the district court was required to inquire whether objections exist; the court described such a procedure as being simply "the desirable practice." *Id.* at 320. Later, the court suggested, but did not hold, that if the charge as given was objectionable and prejudicial then reversible error would exist.

instruction, the basis for the jury's "No" response is unclear; either the jury determined that Evans' conduct was not willful, or it found that the precedent condition ("[i]f and only if you find that age was a determining factor") was not satisfied. In light of the context in which the "one of the reasons" and the "determining factor" language was used, the jury could reasonably infer that they constituted separate and distinct standards, not that the latter clarified the former.

Therefore, for purposes of this opinion, we assume that the jury instructions and interrogatories, taken as a whole, failed to convey the appropriate legal standard in an accurate and clear manner. Accordingly, we turn to the second prong of our fundamental error review: whether the instruction was probably responsible for an incorrect verdict leading to a substantial injustice.

2.

In resolving the second prong, we must determine whether a properly charged jury could have found "some evidence" to support its verdict, *Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 957 (5th Cir. 1993); in doing so we do not, however, engage in a sufficiency of the evidence review.

"Because direct evidence is rare in discrimination cases, a plaintiff ordinarily uses circumstantial evidence and inferences therefrom to satisfy [his] burden of persuasion." *Rhodes v. Guiberson Oil Tools*, ___ F.3d ___, 1994 WL 658858, at *14 n.8 (J. Emilio Garza, dissenting). "The accumulation of circumstantial evidence more than meets the 'any evidence' requirement of the plain [fundamental] error standard." *Purcell*, 999 F.2d at 957.

At the time of his discharge, Spierer, age 43, had been working for Evans for 12 years, eventually becoming manager of Evans' store in San Antonio, Texas. Spierer presented evidence that when Evans terminated store managers over age 40, general statements were given as the reason; managers under the age of 40 were given more descriptive justifications. For example, Spierer identified three former managers, all over age 40, for whom the stated reason for termination was either "not meeting company expectations" or "performance"; the reason for Spierer's termination was "not meeting company expectations." This is in contrast to the reasons given for two terminated managers under the age of 40. One was terminated because his "store [was] not showing results. Need change in [management] direction." The reason given for the other, whom Evans admitted was actually discharged because of sexual harassment, was "mismanagement: corporate dissatisfaction with management ability & leadership skills."

Additionally, Spierer introduced performance evaluations covering his last five years at Evans. All of the evaluations listed Spierer's performance as satisfactory or above; Evans raised no concerns with respect to that performance. On the last evaluation, conducted just over a year prior to Spierer's termination, his performance in 15 of 16 areas was graded as "above average" or "excellent"; seven of these areas contained marks higher than the previous year, while only one area was lower. In attempting to justify Spierer's dismissal, Evans presented evidence that a month prior to his termination, Spierer's new supervisor visited the San Antonio store

and discovered problems that indicated that the store was not run properly.

As stated, for this prong of fundamental error review, our task is not to reweigh the evidence. Instead, we must simply determine whether Spierer presented some evidence from which a jury could conclude that age was a determinative factor for his discharge. We conclude that he did; therefore, Evans has not demonstrated the requisite fundamental injustice resulting from the incorrect instruction.

III.

For the foregoing reasons, we

AFFIRM.

FILED
MARCH 03 1994
By Deputy: /s/ [Not Legible]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-91-CA-1132

Larry P. Spierer, *Plaintiff*
vs.
Evans Inc., *Defendant*

VERDICT FORM

QUESTION NO. 1:

Do you find from a preponderance of the evidence that plaintiff's age was one of the reasons the defendant discharged him?

Answer "Yes" or "No":_____[Yes]_____

If you did not answer "yes" to Question No. 1, then do not proceed. If you answered "yes" to Question No. 1, then proceed.

QUESTION NO. 2:

What amount of back pay damages, if any, has plaintiff incurred as a result of defendant's decision to discharge him?

Answer: $_____[74,764.28]_____

QUESTION NO. 3:

Do you find from a preponderance of the evidence that defendant's decision to discharge the plaintiff because of his age was willful?

Answer "Yes" or "No": [No]

SO SAY WE ALL:

Date: [3/3/94] Foreperson: [/s/Not Legible]

Supreme Court, U.S.
FILED
APR - 3 1995
OFFICE OF THE CLERK

No. 94-1470

In The

Supreme Court of the United States

October Term, 1994

EVANS, INC.,

Petitioner,

v.

LARRY P. SPIERER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MALINDA A. GAUL
Counsel of Record

GAUL AND DUMONT
105 South St. Mary's St., Ste. 950
San Antonio, Texas 78205
(210) 225-0685
(210) 271-9557 – Fax

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR DENYING THE WRIT 3

I. The Fifth Circuit correctly analyzed the required wording for the jury instructions and interrogatories 4

II. Petitioner was not prevented from objecting ... 5

III. Petitioner does not demonstrate the jury verdict resulted from fundamental error 6

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Gehring v. Case Corp., 43 F.3rd 340 (7th Cir. 1994) ...4, 5

Mayall v. Peabody Coal Co., 7 F.3rd 570 (7th Cir. 1993) 5

St. Mary's Honor Center v. Hicks, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) 6

OTHER

Rule 51, Federal Rules of Civil Procedure 6

No. 94-1470

In The

Supreme Court of the United States

October Term, 1994

EVANS, INC.,

Petitioner,

v.

LARRY P. SPIERER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Larry P. Spierer, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Evans, Inc.

STATEMENT OF THE CASE

The following inaccuracies or omissions exist in the statement of the case by the Petitioner:

The regional manager over Koslow's was terminated by Petitioner early in 1991.

Cohen and Stern claimed in statements prepared for the response to the charge of discrimination filed with the Equal Employment Opportunity Commission that numerous and varied problems existed with Spierer's San Antonio store. Cohen claimed he directed Spierer to remedy the alleged deficiencies.

Cohen claimed he again inspected the store in a month or two, but Cohen and Stern assumed their new positions in January and the decision to terminate Spierer was made in February.

Spierer was only told that the reasons for his termination were "poor performance" and "failure to meet company expectations;" nothing more.

Spierer's replacement was not the former assistant store manager. Spierer's replacement had lost his position when Nordstrom's, in Washington, D.C., decided not to renew its lease with Petitioner.

At trial, the jury was instructed to answer question two "If and only if you find that age was a determining factor in the defendant's decision to terminate the plaintiff. . . . " (A. 5)

A panel of the Court of Appeals for the Fifth Circuit, assumed for purposes of their opinion, that the jury instructions and interrogatories, taken as a whole, failed to convey the appropriate legal standard in an accurate and clear manner. (A. 6)

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. The Fifth Circuit agreed with Petitioner that Respondent's burden under the Age Discrimination in Employment Act was to show age was a determinative factor in the decision to terminate Respondent.

II. Petitioner was not prevented from objecting to the submitted instructions and interrogatories; therefore, the Petitioner must prove there was fundamental error in the interrogatories and questions.

III. Petitioner incorrectly urges that "plain error" is the standard of review for the jury instructions and interrogatories. However, since the trial counsel did not object to the submitted instructions and interrogatories, the standard of review is fundamental error. Petitioner does not demonstrate the jury verdict resulted from fundamental error.

REASONS FOR DENYING THE WRIT

The challenge to the jury instructions and interrogatories does not present an issue warranting a Writ of Certiorari.

I. The Fifth Circuit correctly analyzed the required wording for the jury instructions and interrogatories.

Although Petitioner argues otherwise, it has failed to show that the discretionary review of this Court is needed to resolve a conflict between the Fifth Circuit and the other Circuit Courts of Appeal concerning the jury instructions and interrogatories in an Age Discrimination in Employment Act case. The Fifth Circuit in the instant appeal, not only agreed with Petitioner that Respondent was required to show age was a determinative factor in his discharge (A. 4), but found that the failure of the Trial Court to use this exact language in its charge as a whole prevented the accurate and clear conveyance of the appropriate legal standard. (A. 6). Essentially, the Fifth Circuit acknowledged in its opinion that this is the correct language, just as Petitioner requested.

Petitioner cites only a Seventh Circuit opinion as its basis for the contention that uncertainty exists among the circuit courts concerning the correct jury instruction in an age discrimination case. *Gehring v. Case Corp.*, 43 F.3rd 340 (7th Cir. 1994). Petitioner cleverly presents the dicta of *Gehring*, which urges trial courts to use simple and straightforward language in presenting complex legal issues to the jury, as if the Seventh Circuit decision found error in a question which asked the jury to decide if age was a "determining factor" in Gehring's termination. However, a full reading of the decision reveals the opposite is true. The Court affirmed the jury verdict and overruled the alleged error in the jury charge, concluding: "To say that jury instructions ought to avoid legalistic and ambiguous terms is not to say that an instruction

including them is reversible error." *Id.* at 344, citing with approval *Mayall v. Peabody Coal Co.*, 7 F.3rd 570, 573-74 (7th Cir. 1993). It is noteworthy that the *Mayall* decision specifically held the jury instruction using a determining factor ". . . . [e]xpresses the decisional system for discrimination cases constructed by the Supreme Court. The instruction thus correctly informed the jury of the applicable law." *Id.* at 574.

Not only does *Gehring* fail to present a conflict, but the decision below is unpublished and, therefore, cannot be used as authority to create a conflict.

Petitioner has presented no authority for the claim there is uncertainty among the circuit courts. The petition is totally inadequate to invoke discretionary review by this Court on this question.

II. Petitioner was not prevented from objecting.

The second question upon which Petitioner seeks a Writ of Certiorari does not warrant review by this Court. The opinion of the Fifth Circuit cites controlling authority which Petitioner has failed to call into question with any contradictory holdings in the Fifth Circuit or any other circuit. All counsel are required by the Federal Rules to be familiar with the Court rules and the order of proceedings for trial. There is nothing to suggest that trial counsel for Petitioner was prevented from making an objection by a hostile or uncooperative trial judge. The trial record convinced the Fifth Circuit that the trial judge

did not deny Petitioner its rights under Rule 51; therefore, the failure to object only entitled Petitioner to a review for fundamental error. (A. 4-5).

Question Number Two does not present a question of significant importance or one which needs clarification. To the contrary, the provisions of Rule 51 clearly require an objection to a jury instruction or definition to preserve the complaint for appellate review. This is not a novel question, but one that is well settled by case law. Rule 51 means what it says.

III. Petitioner does not demonstrate the jury verdict resulted from fundamental error.

As the opinion of the Fifth Circuit points out, the standard of review of any error in this jury charge is the two pronged fundamental error test. In this third question, Petitioner merely presents a variation of its complaint about the charge. The failure to object to the erroneous charge at trial precluded a review of the sufficiency of the evidence by the Fifth Circuit and precludes that review before this Court. While Petitioner naturally argues the evidence most favorable to it, the jury apparently did not believe that evidence. The Fifth Circuit correctly determined the evidence the jury obviously did believe was "some evidence" and adequate to support the jury verdict.

Respondent submits that Petitioner has misread or misstated the holding of *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). This Court in the *St. Mary's* decision recognized that if the jury

did not believe the employer's explanation for its decision, it may infer that the employer is trying to cover up its age discrimination. 125 L.Ed.2d 407, 418.

Respondent argues there is nothing new presented in the Petition for Writ of Certiorari. Petitioner merely wishes this Court to grant certiorari based on the jury argument which has already failed to convince the trier of fact. Although the Petitioner urges otherwise, the purpose of appeal is not to reweigh the evidence. In addition, the evidentiary determination of the Fifth Circuit does not present an issue which warrants review by this Court.

CONCLUSION

Respondent respectfully states that none of the questions outlined by Petitioner present an issue of such magnitude or complexity justifying the commitment of the scarce resources of the highest court. The Petition does not demonstrate the requisite elements to invoke the discretionary jurisdiction of this honorable Court and accordingly, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF
GAUL AND DUMONT
105 South St. Mary's St., Ste. 950
San Antonio, Texas 78205
(210) 225-0685
(210) 271-9557 – Fax

MALINDA A. GAUL
State Bar #08239800
Attorney for Respondent